Supreme Court, U.S.
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No. 10-944

In The Supreme Court of the United States

CHARLES E. HOLSTER III, Individually and on Behalf of All Others Similarly Situated,

Petitioner,

v.

GATCO, INC., doing business as FOLIO ASSOCIATES,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Second Circuit correctly found, on remand from this Court, that the private-right-of-action provision of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), directs that forum-state law determines whether federal courts may hear TCPA claims.

2. Whether, assuming, *arguendo*, that forum-state law determines whether federal courts may hear TCPA claims, the Second Circuit correctly found that the TCPA's private-right-of-action provision also directs that forum-state law determines whether federal courts may hear TCPA claims as class actions under Rule 23 of the Federal Rules of Civil Procedure.

3. Whether, in construing the TCPA's private-right-of-action provision, the Second Circuit properly relied upon "indications" of Congressional intent rather than upon the text of that provision, even though the Second Circuit made no finding that the text is ambiguous.

4 Whether, assuming, *arguendo*, that the Second Circuit, in interpreting the TCPA's private-right-of-action provision, properly refrained from textual analysis and instead relied upon "indications" of congressional intent, such "indications" support the Second Circuit's findings that forum-state law determines whether federal courts may hear TCPA claims and also determines whether federal courts may hear TCPA claims as class actions under Rule 23 of the Federal Rules of Civil Procedure.

5 Whether, if the private-right-of-action provision of

the TCPA directs that forum-state law determines whether federal courts may hear TCPA claims as class actions under Rule 23 of the Federal Rules of Civil Procedure, the private-right-of-action provision constitutes an un-Constitutional delegation of federal legislative power to the states.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE

The caption lists all of the parties. Petitioner, Charles E. Holster III, is an individual. Therefore, no corporate-disclosure statement is required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF *CERTIORARI*

Charles E. Holster III respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit

OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Second Circuit is reported at 618 F.3d 214 (CALABRESI, J.; PARKER, J.; and UNDERHILL, D.J.), and is reprinted in the Appendix to this Petition ("Appx.") at 1a-7a.

The Order of this Court that granted Petitioner's petition for writ of *certiorari* of the Second Circuit's summary order is reported at 130 S. Ct. 1575, and is reprinted at App 8a-15a.

The summary order of the United States Court of Appeals for the Second Circuit is unreported but is available at 2008 U.S. App. LEXIS 23203 (CALABRESI, J., PARKER, J ; and UNDERHILL, D J.), and is reprinted at Appx. 16a-18a.

The opinion of the District Court is reported at 485 F Supp. 2d 179 (E.D N.Y. 2007) (Bianco, J.), and is reprinted at Appx 19a-34a.

The Order of the United States Court of Appeals for the Second Circuit denying Petitioner's petition for rehearing with suggestion *en banc* is reprinted at Appx. at 35a.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C § 1332(d)(2)(A) ("*Holster I*"). The United States Court of Appeals for the Second Circuit entered judgment on October 31, 2008 ("*Holster II*"). A petition for writ of *certiorari* was filed with this Court on April 16, 2009 (No 08-1307). On April 19, 2010, this Court, in *Holster v. Gatco, Inc.*, 130 S. Ct. 1575 (2010) (*Holster III*), granted the petition, vacated the judgment of the Second Circuit, and remanded the case to the Second Circuit for further consideration in light of *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

On remand, the Second Circuit affirmed *Holster II* (*Holster IV*).

A timely petition for rehearing with suggestion for rehearing *en banc* was denied by the Second Circuit on October 25, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves the Telephone Consumer Protection Act, 47 U S.C. § 227 ("TCPA"), and Section 901(b) of the New York Civil Practice Law and Rules ("CPLR").

In relevant part, the TCPA states:

> [47 U.S.C. § 227](b)(1) It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within

the United States– . . .

[47 U S.C. § 227(b)(1)](C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement .

[47 U.S.C. § 227(b)](3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

CPLR § 901(b) states, in its entirety "[u]nless a statute creating or imposing a penalty or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."

STATEMENT OF THE CASE

This petition presents the issue of whether CPLR § 901(b), which prohibits class actions in New York *state* courts from seeking statutory damages, applies to TCPA claims in *federal* courts in New York.

Petitioner brought the underlying diversity action in the Eastern District of New York under 28 U.S.C § 1332(d)(2) of the Class Action Fairness Act ("CAFA").

The District Court, on two grounds, granted Respondent's motion to dismiss for lack of subject-matter jurisdiction: (1) that the private-right-of-action of the TCPA ("PROA Provision") incorporates state substantive law into TCPA claims that are brought in federal court, and (2) that CPLR § 901(b) is substantive. *See* Appx. 19a-34a.

The Second Circuit affirmed the ruling of the District Court by summary order. *See* Appx. 16a-18a.

On April 16, 2009, a timely petition for writ of *certiorari* of the Second Circuit's summary order was filed.

On March 31, 2010, this Court decided *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), which held that Rule 23 of the Federal Rules of Civil Procedure is a valid federal rule under the Rules Enabling Act and that therefore, it, rather than CPLR § 901(b), which conflicts with Rule 23, applies to claims that are heard in a New York federal court even where such claims would, if heard in a New York state court, be subject to CPLR §

901(b).

On April 19, 2010, this Court, in *Holster v. Gatco, Inc.*, 130 S. Ct 1575 (2010) (*Holster III*), granted Petitioner's *certiorari* petition, vacated the judgment of the Second Circuit, and remanded the case to the Second Circuit for further consideration in light of *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) Appx 8a-15a.

On remand from *Holster III*, the Second Circuit, in *Holster IV*, affirmed *Holster II*. Appx. 1a-7a

REASONS FOR GRANTING THE PETITION

POINT I

FOLLOWING THE REMAND ORDER OF THIS COURT, THE SECOND CIRCUIT ADHERED TO ITS PRIOR DETERMINATION BASED UPON REASONING THAT THE MAJORITY OF THIS COURT, IN ITS REMAND ORDER, HAD IMPLICITLY REJECTED

The District Court action, which was brought as a class action, arose under the TCPA, which, *inter alia*, makes it unlawful "to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). The PROA Provision of the TCPA states that:

> [a] person or entity may, if otherwise permitted by the *laws or rules of court of a State*, bring in an *appropriate court of that State*—(A) an action based on a violation of this subsection . . . to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or (C) both such actions.

47 U.S.C. § 227(b)(3) (emphases added).

In its October 31, 2008, summary order *(Holster II)*, the Second Circuit, for its holding that CPLR § 901(b) precludes the application of Rule 23 to TCPA

claims in New York federal courts, relied entirely upon *Bonime v. Avaya, Inc*, 547 F.3d 497 (2d Cir. 2008). *See* Appx. at 18a.

Bonime's holding was based on two grounds. First, in *Bonime*'s view, TCPA claims, although federally created, are, by virtue of the PROA Provision, "functional" state-law claims and thus subject to the doctrine of *Erie R.R. v. Tompkins*, 304 U.S 64 (1938), such that, in diversity actions, those claims are governed by state substantive law, which, *Bonime* found, includes CPLR § 901(b). *See Bonime*, 547 F 3d at 500-502.

The second ground of *Bonime* stated somewhat opaquely as follows:

> A second, independent reason reinforces th[e] conclusion [that CPLR § 901(b) applies to TCPA claims in New York federal courts]. The private right of action created by the TCPA allows a person or entity to, "if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State," an action for a violation of the TCPA. *See* 47 U.S C. § 227(b)(3). This statutory language is unambiguous—a claim under the TCPA cannot be brought if not permitted by state law. . . . This provision constitutes an express limitation on the TCPA which federal courts are required to respect.

Bonime, 547 F.3d at 502.

In *Holster IV*, the Second Circuit acknowledged

that *Bonime*'s first "ground, predicated on *Erie*, [was] abrogated by *Shady Grove*." Appx. 5a. *See also id.* ("to the extent that our prior holding was based on treating the TCPA 'as if it were a state law,' *Bonime*, 547 F.3d at 501, *Shady Grove*'s holding that [Federal] Rule [of Civil Procedure] 23 generally preempts C.P.L.R. 901(b) abrogates our holding."). However, *Holster IV* maintained the second ground of *Bonime*, *supra*, which in the Second Circuit's view had not been abrogated by *Shady Grove*.

> [Judge Calabresi's] concurrence [in *Bonime*] further explained [*Bonime*'s] second rationale. Because federal law (the TCPA) uses state law to define the federal cause of action, when the state refuses to recognize that cause of action, "there remains [nothing] to which any grant of federal court jurisdiction could attach." [*Bonime*, 547 F.3d] at 503 (Calabresi, J., concurring).
>
> ***
>
> . . . [*Shady Grove*] said nothing at all about the TCPA, and what that statute requires for a federal cause of action to lie. This . . . is a standard question of statutory interpretation. What did Congress mean when it said [in the PROA Provision] that TCPA suits may proceed "if otherwise permitted by the laws or rules of court of a State," 47 U.S.C. § 227? We now read [the PROA Provision], as the [*Bonime*] concurrence did before, as a delegation by Congress to

> the states of considerable power to determine which causes of action lie under the TCPA.
>
> ***
>
> Congress intended to give states a fair measure of control over solving the problems that the TCPA addresses. The ability to define when a class cause of action lies and when it does not is part of that control . .
>
> ***
>
> Because *Shady Grove* says nothing about *Bonime*'s second ground, we find that ground continues to control this case.

Appx. 4a, 5a, 7a (emphasis added).

The Second Circuit expressly stated in *Holster IV* that it disagreed with Justice Scalia's concurring opinion in *Holster III*:

> Holster, echoing Justice Scalia's concurrence in [*Holster III*], argues that [our] reading is untenable because it would create the absurd result of a litigant losing his putative federal right to recover under the TCPA for failing to follow trivial state court rules about "the color and size of the paper" used for the complaint. *Holster* [*III*], 130 S. Ct. at 1576 (Scalia, J., concurring). If we had to read the [PROA Provision]'s "otherwise

> permitted" language as barring the applicability of the TCPA when any state rule, however insignificant, was not conformed with, this argument would have force But, there exists no rule prohibiting courts from reading a law with any [sic] eye to the legislature's goals in enacting the statute; quite the contrary. . . .
>
> ***
>
> In light of this principle, nothing prevents us from saying that Congress intended some, but not necessarily all, state "rules of court" to define what causes of action can lie under the TCPA. . . Congress intended to give states a fair measure of control over solving the problems that the TCPA addresses. The ability to define when a class cause of action lies and when it does not is part of that control. Exactly how far that control extends is not before us. That Congress intended to let a TCPA suit be barred by a state due to the particulars of the paper used in filing seems unlikely, but that is a question for another day.

Appx. 5a, 6a, 7a (additional citational language omitted).

In addition to Justice Scalia's explicit disagreement with the second rationale of *Bonime*, *i.e.*, with the rationale of *Holster IV*, the other five Justices of the six-Justice majority in *Holster III* apparently

had doubts about that rationale as well; for, that rationale, had it been valid, would have been sufficient to preclude the vacature of *Holster II* because it would, standing alone, have resulted in the application of CPLR § 901(b) in the District Court action (just as *Holster IV* found). Indeed, this was the precise reasoning of the *dissent* in *Holster III*. *See* Appx. 14a-15a (Ginsburg, J., dissenting).

It is also telling that Justices Kennedy and Breyer, both of whom *dissented* in *Shady Grove*, joined the *majority* in *Holster III*, thereby making it apparent that, like the other four Justices in the *Holster III* majority, Justices Kennedy and Breyer also had doubts about what is now the rationale of *Holster IV*.

POINT II

THE UNDERLYING PREMISE OF THE SECOND CIRCUIT'S OPINION, WHICH IS THAT FORUM-STATE LAW DETERMINES WHETHER FEDERAL COURTS MAY HEAR TCPA CLAIMS, IS ERRONEOUS

As shown in Point I, *supra*, the Second Circuit, in *Holster IV*, operated upon the premise that forum-state law determines whether TCPA claims may be heard in federal court. This was erroneous.

Under the PROA Provision, one may bring a TCPA claim in state court if "otherwise permitted by the laws or rules of court of a State." 47 U.S.C. § 227(b)(3). As a New York appellate court explained, the "if otherwise permitted" clause of the PROA Provision "merely acknowledges the principle that *States* have

the right to structure their *own court systems* and that *State courts* are not obligated to change *their procedural rules to accommodate TCPA claims.*" *Schulman v. Chase Manhattan Bank*, 710 N.Y S 2d 368, 372 (N.Y. App. 2000) (emphases added), *accord*, *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc*, 857 A.2d 1, 16-17 (Md. 2004); *Mulhern v. MacLeod*, 808 N E.2d 778, 779 (Mass. 2004); *Condon v. Office Depot, Inc.*, 855 So. 2d 644, 647 (Fla. App. 2003)

The Second Circuit's finding in *Holster IV* that forum-state law determines the actionability of TCPA claims in federal court is based on the Second Circuit's ignoring of the fact that the "if otherwise permitted" clause of the PROA Provision is expressly confined to *state*-court TCPA claims. Only by its effective deletion of the phrase, "in an appropriate court *of that State*," 47 U.S.C. § 227(b)(3) (emphasis added), was the Second Circuit able to maintain that the PROA Provision concerns federal courts as well as state courts. That is, the Second Circuit, in posing the question at issue, made no distinction between state courts and federal courts:"What did Congress mean when it said that TCPA suits may proceed 'if otherwise permitted by the laws or rules of court of a State,' 47 U.S C. § 227?" Appx. 5a.

Prior to *Bonime*, *supra*, the Second Circuit implicitly recognized that the actionability of TCPA claims in a state's own courts is not a prerequisite to the actionability of TCPA claims in a *federal* court in that state. In *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432 (2d Cir. 1998), the Second Circuit held that TCPA claims give rise to substance-based jurisdiction only in state courts, *i.e.*, that TCPA claims do not give rise to

federal-question jurisdiction. *See id.* at 435. *Accord, Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998), but *see id.* at 112-114 (Alito, J., dissenting) ; *Int'l Science & Tech. Inst., Inc. v. Inacom Communs., Inc.*, 106 F.3d 1146, 1153 (4th Cir. 1997), *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 510 (5th Cir. 1997); *Murphey v. Lanier*, 204 F.3d 911, 912 (9th Cir. 2000); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998). But *see Charvat v. Echostar Satellite, LLC*, ___ F.3d ___, 2010 WL 5392875 at *3-*5 (6th Cir. Dec. 30, 2009) (holding that TCPA claims are subject to federal-question jurisdiction); *accord, Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 450 (7th Cir. 2005). If forum-state law determined whether TCPA claims could be brought in federal court, *Foxhall* would presumably been resolved based on the issue of whether TCPA claims are actionable in New York state courts.

Foxhall, consistent with its apparent recognition that the actionability of federal-court TCPA claims is *not* determined by state law, explained that "the clause in [the PROA Provision] that states 'if otherwise permitted by the laws or rules of court of a State,' does not condition the substantive right to be free from unsolicited faxes on state approval. Rather, the clause recognizes that *states* may refuse to exercise the *jurisdiction* authorized by the statute " *Foxhall*, 156 F 3d at 438 (emphases added). Therefore, continued *Foxhall*, "[t]o the extent that a state decides to prevent *its courts* from hearing private actions to enforce the TCPA's substantive rights, the existence of a private right of action under the TCPA could vary from *state to state*," *id.* (emphases added), *i.e.*, from the *state courts* of one state to the *state courts* of another state. Thus,

Foxhall, in holding that there is no federal-question jurisdiction over TCPA claims, appeared to recognize that the issue of whether federal courts may hear TCPA claims does not change from state to state depending upon whether TCPA claims may be brought in a particular state's own courts.

In *Gottlieb v. Carnival Corp.*, 436 F.3d 335 (2d Cir. 2006), which held that TCPA claims are subject to diversity jurisdiction, the Second Circuit again implicitly recognized that the actionability of federal-court TCPA claims has nothing to do with state law. In *Gottlieb*, the court explained that, "[28 U.S.C.] § 1332 applies to *all* causes of action, whether created by state or federal law, unless Congress expresses a clear intent to the contrary. . . . Here, there is no clear statement of congressional intent to divest the federal courts of diversity jurisdiction over private TCPA claims." *Id.* at 340-341 (emphasis added). *See also id.* at 342 ("[w]e see no reason to conclude that . . . Congress sought to restrict TCPA plaintiffs' access to the federal courts where an *independent basis of federal jurisdiction* exists." (emphasis added)).

In *Gottlieb*, the Second Circuit also observed that, "[i]t is odd, of course, that a federal court sitting in diversity and considering a TCPA claim would apply *federal substantive and procedural law*. This fact, however, only emphasizes the *sui generis* nature of the statute. It is the rare *federal statute* that creates a cause of action that gives rise to jurisdiction under [28 U.S.C.] § 1332, but not under [28 U.S.C.] § 1331." *Gottlieb*, 436 F.3d at 343, n 8 (emphases added) However, under the Second Circuit's holding in *Holster IV*, federal courts hearing TCPA claims would not only have to apply substantive *and* procedural state law to

TCPA claims, but, as set forth below, those courts would also have to engage in an elusory analysis of legislative intent to determine which such law to apply.

If forum-state law determines whether a federal court may hear TCPA claims, *Gottlieb*, like *Foxhall*, would have been expected to predicate its holding based upon the question of whether TCPA claims could be heard in New York state courts.

In short, the Second Circuit, in *Holster IV*, effectively revisited *Gottlieb* and *Foxhall* and found, albeit implicitly, that the question of whether a federal court has jurisdiction over a TCPA claim is determined by state law.

It is arguable that the PROA Provision frees the states from the Supremacy Clause's principle that "[f]ederal law takes state courts as it finds them *only insofar as those courts employ rules that do not impose unnecessary burdens upon rights of recovery authorized by federal laws*." *Felder v. Casey*, 487 U.S. 131, 150 (1988) (emphasis added) (citation and quotation marks omitted). Under this argument, the PROA Provision gives states carte blanche with respect to whether, and how, to hear TCPA claims in their *own* courts. *See Int'l Science & Technology Institute v. Inacom Communications*, 106 F.3d 1146, 1155-1158 (4th Cir 1997); *Lary v. Flasch Bus. Consulting, Inc.*, 878 So. 2d 1158, 1164 (Ala. App. 2003); *Kaufman v. ACS Systems, Inc.*, 2 Cal.Rptr. 3d 296, 304 (Calif. App. 2003); *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 910 (Mo. 2002), *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W.3d 365, 381-383 (Tex App. 2004); *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468, 470-471 (Ga. App. 2000).

Assuming, *arguendo*, that the PROA Provision authorizes states to treat TCPA claims outside of the confines of the Supremacy Clause, nothing in the PROA Provision would support the notion that a state's laws also determine whether TCPA claims are actionable in *federal* courts, much less that forum-state law also determines whether federal courts may hear TCPA claims as class actions under Rule 23 of the Federal Rules of Civil Procedure.

POINT III

EVEN IF FORUM-STATE LAW DETERMINED WHETHER FEDERAL COURTS MAY HEAR TCPA CLAIMS, THE SECOND CIRCUIT'S FINDING THAT NEW YORK LAW BARS NEW YORK FEDERAL COURTS FROM HEARING TCPA CLAIMS AS CLASS ACTIONS WOULD REMAIN ERRONEOUS, FOR TCPA CLAIMS *MAY* BE BROUGHT IN NEW YORK STATE COURTS

Even if, under the PROA Provision, forum-state law determined whether TCPA claims could be brought in federal court, *Holster IV* would *still* be erroneous for finding that forum-state law also determines whether federal courts may hear TCPA claims as class actions under Rule 23 of the Federal Rules of Civil Procedure. Justice Scalia, though not addressing, in his concurrence in *Holster III*, the issue of whether the PROA Provision means that state law determines whether a federal court may hear TCPA claims altogether, did explain in any event that forum-state law does not determine whether federal courts may hear TCPA claims as class actions under Rule 23:

> Nothing in *Bonime* suggests . . that a federal court could not consolidate two suits under the [TCPA] for its own convenience, *see* Fed. Rule Civ. Proc. 42(a), even if the State's courts did not allow consolidation. . . . *[T]hat logic applies equally to Rule 23's method of combining claims*. . .
>
> *Shady Grove* would also affect the outcome [in *Holster IV*] if the *Bonime* court believed that even if Rule 23 would otherwise allow a federal court to entertain a class action, [the PROA Provision] supersedes Rule 23 by precluding suits that cannot be brought in state courts, *including class actions barred by §901(b). Shady Grove* reveals the error in this analysis: *Section 901(b) does not prevent a plaintiff from bringing "an action* to recover a penalty, or minimum measure of recovery created or imposed by statute"—as would be necessary to implicate §227(b)(3)—but only from "maintain[ing]" such a suit "*as a class action*" (emphasis added). *Shady Grove*, 130 S. Ct. at 1437 (plurality opinion), *see also id.*, at 1436.

Holster III, Appx 10a, 11a (Scalia, J , conc) (emphases added).

A fundamental error of the Second Circuit in *Holster IV* is that the court utilized the term "class cause of action" as though that were a type of claim or cause of action in and of itself. *See* Appx. 7a; *accord*,

Appx. 4a, 5a. However, a class action is simply a "procedural device[] to permit some to prosecute or defend an action without the necessity of all appearing as plaintiffs or defendants." *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 298 (1973).

Finally, the Second Circuit, in *Holster IV*, suggested that, although forum-state law determines whether federal courts may hear TCPA claims as class actions under Rule 23 of the Federal Rules of Civil Procedure, comparatively trivial state laws would not supersede federal procedural rules. *See* Appx. 7a. However, as Justice Scalia explained in *Holster III*, nothing in the PROA Provision supports the notion that, among a forum state's laws that apply to TCPA claims in state court, only *some* of those laws also apply in federal court:

> If [*Bonime*, *supra*] meant that [the PROA Provision] requires federal courts hearing claims under the [TCPA] to apply all state procedural rules that would effectively bar a suit . . . is . . . a highly implausible reading of the [TCPA]. Besides effecting an implied partial repeal of the Rules Enabling Act, 28 U S.C. § 2072, it would require federal courts to enforce any prerequisite to suit state law makes mandatory— a state rule limiting the length of the complaint, for example, or specifying the color and size of the paper

Appx. at 9a-10a. That is, if federal-court TCPA claims are subject to *some* of a state's procedural rules (although they are not), they are subject to *all* of them.

POINT IV

IT WAS IMPROPER OF THE SECOND CIRCUIT TO RELY UPON "INDICATIONS" OF CONGRESSIONAL INTENT RATHER THAN UPON THE PLAIN TEXT OF THE PRIVATE-RIGHT-OF-ACTION PROVISION OF THE TCPA

It is a "settled principle[] of statutory construction [that a court] must first determine whether the statutory text is plain and unambiguous. If it is, [the court] must apply the statute according to its terms." *Carcieri v. Salazar*, 129 S Ct. 1058, 1063-1064 (2009) (citations omitted). Disregarding this principle, the Second Circuit, in *Holster IV*, did not engage in any textual analysis of the PROA Provision to determine whether its "text is plain and unambiguous," much less determine what that plain meaning is. Instead, the Second Circuit purported to divine Congress's 'intent':

> After lauding states' efforts to combat telemarketing abuses, the TCPA's congressional findings suggest that a key issue the statute aimed to resolve was the inability of state laws to deal with the problem's interstate nature. TCPA § 2(7) (codified as a note to § 227). And the statute expressly declined to preempt state regulations that were more restrictive of telemarketing than the minimal federal requirements of the statute. 47 U.S.C. § 227(e)(1). These indications say to us that Congress intended to give states a fair measure of control over solving the problems that the

TCPA addresses.

Appx. 6a-7a (additional citational language omitted).

POINT V

THE "INDICATIONS" OF CONGRESSIONAL INTENT UPON WHICH THE SECOND CIRCUIT RELIED IN INTERPRETING THE PRIVATE-RIGHT-OF-ACTION PROVISION OF THE TCPA DO NOT SUPPORT THE SECOND CIRCUIT'S FINDING THAT FORUM-STATE LAW DETERMINES WHETHER FEDERAL COURTS MAY HEAR TCPA CLAIMS AS CLASS ACTIONS UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Even aside from the fact that the meaning of the PROA Provision is clear, neither of the two "indications" upon which *Holster IV* relied supports the Second Circuit's interpretation of Congress's 'intent.'

First, the Second Circuit cited a single paragraph of Congressional findings, *i.e.*, "TCPA § 2(7) (codified as a note to § 227)," Appx. 7a, which the court described as "lauding states' efforts to combat telemarketing abuses [and] suggest[ing] that a key issue the statute aimed to resolve was the inability of state laws to deal with the problem's interstate nature." *Id.* The paragraph actually states as follows: "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices." This paragraph, which does not purport to be an operable

legal provision in any event, does not suggest that state law should have any bearing upon the issue of whether TCPA claims could be heard in federal court, much less whether they could be heard as class actions in federal court.

The second purported "indication" upon which the Second Circuit relied was that "the [TCPA] expressly declined to preempt state regulations that were more restrictive of telemarketing than the minimal federal requirements of the statute," Appx. 6a, citing 47 U S.C. § 227(e)(1). However, Section 227(e)(1) concerns only the *substantive* content of state telemarketing laws, *see* 47 U.S.C. § 227(e)(1), and thus has nothing to do with whether, or in what procedural context, a TCPA claim may be brought in a state's *own* courts, let alone in *federal* courts.

POINT VI

IF, AS THE SECOND CIRCUIT FOUND, THE PRIVATE-RIGHT-OF-ACTION PROVISION OF THE TCPA DIRECTS FORUM-STATE LAW TO DETERMINE WHETHER FEDERAL COURTS MAY HEAR TCPA CLAIMS AS CLASS ACTIONS UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE, THE PRIVATE-RIGHT-OF-ACTION PROVISION WOULD CONSTITUTE AN UN-CONSTITUTIONAL DELEGATION OF FEDERAL LEGISLATIVE POWER TO THE STATES

In *Holster IV*, the Second Circuit claimed that the issue of

> what [the PROA Provision] requires for a federal cause of action to lie . . . is not a question that implicates the relationship between the Federal Rules and state rules; it is a standard question of statutory interpretation . . . We now read [the PROA Provision], as the concurrence [in *Bonime*] did before, as a *delegation by Congress to the states of considerable power to determine which causes of action lie under the TCPA.*
>
> ***
>
> The ability to define when a *class cause of action* lies and when it does not is part of that control.

Appx. 5a, 7a (emphases added).

To the extent that, under *Holster IV*, the PROA Provision would require state law to supplant federal procedural rules, the PROA Provision would be un-Constitutional.

The Constitution vests Congress with the "power to regulate the practice and procedure of federal courts," *Mistretta v. United States*, 488 U.S. 361, 387 (1989), quoting *Sibbach v. Wilson & Co.*, 312 U. S 1, 9-10 (1941) (footnote omitted from original). This power is provided by the Article III provision that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and [shall be vested] in such inferior Courts as the Congress may from time to time ordain and establish," U S. Const., Art III, § 1, and the Article I provision that "[t]he Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court." U.S. Const., Art. I, § 8, c.l 9. Nevertheless, this Court "ha[s] recognized significant exceptions to this general rule and ha[s] approved the assumption of some nonadjudicatory activities by the Judicial Branch." *Id.* at 386.

One such instance of Congress's "power to delegate rulemaking authority to the Judicial Branch" is that part of the Rules Enabling Act that "expressly . . . authorize[s] this Court to establish rules for the conduct of its own business and to prescribe rules of procedure for lower federal courts . . . in [] civil cases." *Id.* at 388. As noted in *Mistretta*, "a challenge to certain [Federal] [R]ules [of Civil Procedure] promulgated under the Rules Enabling Act" was rejected in *Sibbach v. Wilson & Co.*, 312 U S. 1 (1941). *Mistretta*, 488 U.S. at 387. In *Sibbach*, this Court

explained that "'Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States.'" *Mistretta*, 488 U.S. at 387, quoting *Sibbach*, 312 U. S at 9-10 (footnote omitted from original).

While neither *Mistretta* nor *Sibbach* explicitly stated that Congress's power to delegate authority to the judicial branch is analogous to Congress's power to delegate authority to the executive branch, that is clearly the case. Indeed, this Court, in *Touby v. United States*, 500 U S. 160 (1991), while addressing Congress's power to delegate authority to the executive branch, spoke, in general terms, of Congress's power to delegate authority to the executive *and* judicial branches.

Under the "nondelegation doctrine," *Touby*, 500 U.S. at 165, which is derived from the Constitutional provision that "'[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,'" *id.* at 164-165, quoting U S Const., Art. I, § 1, "Congress may not constitutionally delegate its legislative power to another branch of Government." *Id.* at 165. However, just as *Mistretta* and *Sibbach* recognized specifically with respect to the judicial branch, *Touby* noted that this Court "ha[s] long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches . . . [s]o long as Congress lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Touby*, 500 U.S. at 165 (citation and

quotation marks omitted).

The TCPA's PROA Provision would, under the Second Circuit's interpretation of it, be unconstitutional for two reasons. First, a state is not a branch of the federal government and thus may not be given authority by Congress to make federal law, including the authority "'to regulate the practice and procedure of federal courts.'" *Mistretta*, 488 U.S at 387, quoting *Sibbach*, 312 U. S. at 9. Thus, the delegation of such power to the states would violate principles of federalism, "[t]he essence of a constitutionally formulated federalism [being] the division of political and legal powers between two systems of government constituting a single Nation." *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958).

Second, insofar as, according to the Second Circuit in *Holster IV*, the PROA Provision confers upon each state the authority to determine whether the federal courts in that state may hear TCPA claims as class actions under Rule 23, the PROA Provision "provide[s] literally no guidance for the exercise of [that] discretion." *Whitman v. American Trucking Assoc., Inc.*, 531 U.S. 457, 474 (2001).

In sum, the PROA Provision, as interpreted by the Second Circuit, violates the principles of federalism and the non-delegation doctrine.

CONCLUSION

For the foregoing reasons, Charles E. Holster III respectfully requests that this Petition for Writ of *Certiorari* be granted.

January 12, 2011

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2009

(Submitted After Remand: May 19, 2010
Decided: August 24, 2010)

Docket No. 07-2191-cv

CHARLES E. HOLSTER III, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v.

GATCO, INC., doing business as FOLIO ASSOCIATES,

Defendant-Appellee.

Before: CALABRESI, B.D. PARKER, Circuit Judges, UNDERHILL,[1] District Judge.

This case is before us on remand from the Supreme Court, which granted certiorari, vacated our prior decision that had affirmed the district court, and remanded the case to us for reconsideration in light of the Supreme Court's decision in *Shady Grove*

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[1] The Honorable Stefan R. Underhill, of the United States District Court for the District of Connecticut, sitting by designation.

Orthopedic Associates, P.A., v. Allstate Insurance Co., 130 S. Ct. 1431 (2010). *Holster v. Gatco, Inc.*, 130 S. Ct 1575 (2010). After careful review of *Shady Grove*, we once again AFFIRM.

TODD C. BANK, Kew Gardens, N.Y., *for Plaintiff-Appellant.*

JEREMY GILMAN & GREGORY LUCHT (Benesch, Friedlander, Coplan & Aronoff LLP), Cleveland, OH; JOEL SHAFFERMAN, New York, N.Y., *for Defendant-Appellee.*

CALABRESI, *Circuit Judge*:

Background

This case centers on the intersection of four laws: (a) the federal Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, which provides a statutory penalty of $ 500 for each instance of unsolicited, commercial fax transmission and a federal cause of action *"if otherwise permitted by the laws or rules of court of a State." Id. § 227*(b)(3) (emphasis added); (b) New York C P.L.R. 901(b), which prohibits class-action suits seeking statutory damages; (c) Federal Rule of Civil Procedure 23, which authorizes class-action suits in federal courts when various criteria are met; and (d) the federal Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(2)(A), which gives federal courts jurisdiction over class actions alleging at least $ 5 million of damages so long as there is minimal diversity among the parties.

Alleging violations of the TCPA, Charles Holster sued Gatco, Inc. in federal court in a putative class action under Rule 23. He grounded federal jurisdiction in CAFA. Gatco moved to dismiss, claiming that, due to C.P.L.R. 901(b), a class action could not be maintained in New York. Relying on the TCPA's "otherwise permitted" language, Gatco argued that, as a result, no suit could lie under the TCPA and therefore that CAFA could not apply. That meant, Gatco concluded, that the district court lacked jurisdiction. Agreeing, that court (Bianco, *J.*) dismissed the case.

We affirmed in a summary order predicated on a case decided the same day, raising the same issue, *Bonime v. Avaya, Inc.*, 547 F.3d 497 (2d Cir. 2008). *Holster v. Gatco, Inc.*, No. 07-2191-cv, 2008 U.S. App. LEXIS 23203 (2d Cir. Oct. 31, 2008). In *Bonime* we held that C.P.L.R. 901(b) applied to TCPA actions in New York for two, independent, reasons. First, we explained that "because Congress directed that the TCPA be applied as if it were a state law," the *Erie* doctrine required federal courts to apply C.P.L.R. 901(b) to TCPA claims in New York. *Bonime*, 547 F.3d at 501. To hold otherwise, we said, "would create a predictable and foreseeable outcome-determinative difference that would strongly encourage forum shopping and create inequitable administration of the laws." *Id.* at 501-02. Second, we found that the specific language of the TCPA that allows a person to sue under it only "if otherwise permitted by the laws or rules of court of a State," 47 U.S.C. § 227(b)(3), "constitutes an express limitation on the TCPA which federal courts are required to respect." *Bonime*, 547 F.3d at 502. A concurrence further explained this second rationale. Because federal law (the TCPA) uses

state law to define the federal cause of action, when the state refuses to recognize that cause of action, "there remains [nothing] to which any grant of federal court jurisdiction could attach." *Id.* at 503 (Calabresi, *J.*, concurring).

Subsequently, the Supreme Court granted certiorari, vacated our decision, and remanded the case for reconsideration in light of its opinion in *Shady Grove Orthopedic Associates, P.A., v. Allstate Insurance Co.*, 130 S. Ct. 1431, 176 L. Ed 2d 311 (2010). *Holster v. Gatco, Inc.*, 130 S. Ct. 1575, 176 L. Ed. 2d 716 (2010).[2] In *Shady Grove*, the Court considered whether C.P.L.R. 901(b) applied—in general—to claims filed under CAFA in New York federal courts. Finding that C.P.L.R. 901(b) conflicted with Rule 23, which constitutes a valid Rule under the Rules Enabling Act, the Court held that C.P.L.R. 901(b) was preempted. *Shady Grove*, 130 S. Ct. at 1437, 1438. We now must decide the extent to which Shady Grove undercuts each of our separate and independent holdings in *Bonime*. Though we find the first ground, predicated on *Erie*, abrogated by *Shady Grove*, we see nothing in the Court's *holding* that undermines the second ground, which rests not on the relationship between the Federal Rules of Civil Procedure and state rules, but on the unique nature of the federal action the TCPA created.

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[2] Bonime failed to seek certiorari and so the Supreme Court has issued no order in that case.

Discussion

Regarding *Bonime*'s first rationale, Holster argues that the *Shady Grove* Court was clear that "Rule 23 answers the question" of whether a case based on New York state law may proceed as a class action in federal court. *Shady Grove*, 130 S. Ct. at 1437. Under *Shady Grove*, he argues, if the requirements of Rule 23 are met and if federal jurisdiction otherwise exists, C.P.L.R. 901(b)'s bar of New York class-action suits seeking statutory damages is irrelevant. We agree. And to the extent that our prior holding was based on treating the TCPA "as if it were a state law," *Bonime*, 547 F.3d at 501, *Shady Grove*'s holding that Rule 23 generally preempts C.P.L.R. 901(b) abrogates our holding.

But this answers only a part of the question before us. Though the *Shady Grove* Court said a great deal about the interaction of Rule 23 and C.P.L.R. 901(b), it said nothing at all about the TCPA, and what that statute requires for a federal cause of action to lie. This is not a question that implicates the relationship between the Federal Rules and state rules; it is a standard question of statutory interpretation. What did Congress mean when it said that TCPA suits may proceed "if otherwise permitted by the laws or rules of court of a State," 47 U.S.C. § 227? We now read it, as the concurrence did before, as a delegation by Congress to the states of considerable power to determine which causes of action lie under the TCPA.

Holster, echoing Justice Scalia's concurrence in the remand order, argues that this reading is untenable because it would create the absurd result of a litigant losing his putative federal right to recover

under the TCPA for failing to follow trivial state court rules about "the color and size of the paper" used for the complaint. *Holster*, 130 S. Ct. at 1576 (Scalia, *J.*, concurring). If we had to read the TCPA's "otherwise permitted" language as barring the applicability of the TCPA when any state rule, however insignificant, was not conformed with, this argument would have force. But, there exists no rule prohibiting courts from reading a law with any eye to the legislature's goals in enacting the statute; quite the contrary. It is, for example, one of the oldest principles of tort law that, in a suit on a statute, a plaintiff may only recover for the type of injury—the "mischief"—that the statute sought to prevent. *See, e.g., Gorris v. Scott*, (1874) 9 L R Exch 125, 125; *Warner v. Goltra*, 293 U S. 155, 158, 55 S. Ct. 46, 79 L. Ed. 254 (1934) (Cardozo, J.) ("Our concern is to define the meaning [of a statutory term] for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained."). Nor is this focus on the context of a law, as well as on its text, limited to torts. *See, e.g., Milavetz, Gallop & Milavetz, PA. v. United States*, 130 S. Ct 1324, 1337, 176 L. Ed. 2d 79 (2010) (examining the purposes of the Bankruptcy Code, as well as the text and context of the specific provision at issue, to determine that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 only prohibits debt relief agencies from advising clients to accrue additional debt as part of a plan to take unfair advantage of the bankruptcy system); *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 95 (2d Cir. 2008) (giving the benefit of the doubt in a provision of the Fair Debt Collection Practices Act to consumers in light of the fact that "the Act is primarily a consumer protection statute").

In light of this principle, nothing prevents us from saying that Congress intended some, but not necessarily all, state "rules of court" to define what causes of action can lie under the TCPA. After lauding states' efforts to combat telemarketing abuses, the TCPA's congressional findings suggest that a key issue the statute aimed to resolve was the inability of state laws to deal with the problem's interstate nature. TCPA § 2(7), Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified as a note to § 227). And the statute expressly declined to preempt state regulations that were more restrictive of telemarketing than the minimal federal requirements of the statute. 47 U.S.C. § 227(e)(1) These indications say to us that Congress intended to give states a fair measure of control over solving the problems that the TCPA addresses. The ability to define when a class cause of action lies and when it does not is part of that control. Exactly how far that control extends is not before us. That Congress intended to let a TCPA suit be barred by a state due to the particulars of the paper used in filing seems unlikely, but that is a question for another day.

Because *Shady Grove* says nothing about *Bonime*'s second ground, we find that ground continues to control this case Therefore, we AFFIRM the district court's dismissal for lack of jurisdiction.

SUPREME COURT OF THE UNITED STATES

CHARLES E. HOLSTER, III *v.* GATCO, INC.,dba FOLIO ASSOCIATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08-1307. Decided April 19, 2010

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U.S. ___ (2010). JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

JUSTICE SCALIA, concurring.

Petitioner Charles Holster filed this suit in federal court seeking actual and statutory damages—on behalf of himself and a class of others similarly situated—for alleged violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227. The District Court dismissed the suit, holding that the rule of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), applies to federal suits under the Act, and that N Y. Civ. Prac. Law Ann. § 901(b) (West 2006)—which bars class actions in suits seeking statutory damages—is "substantive" under *Erie*. 485 F. Supp. 2d 179, 184-186 (EDNY 2007). Federal Rule of Civil Procedure 23 had no bearing, it added, because " §901(b) is a matter not covered by [Rule] 23." *Id.*, at

185, n. 3.

The Second Circuit summarily affirmed on the basis of its decision (issued the same day by the same panel) in *Bonime* v. *Avaya, Inc.*, 547 F.3d 497 (2008). *Bonime* held that §901(b) applies to suits brought under the Act in federal court for two reasons. First, it read the Act to require that federal courts treat claims under the Act as though they arise under state law and therefore are subject to *Erie* 547 F 3d at 501 Second, *Bonime* held that §227(b)(3)'s text—which provides that "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" a suit for actual and statutory damages—forbids federal courts from hearing suits under the Act that would be barred in state court. 547 F.3d at 502

Shady Grove Orthopedic Associates, P. A. v. *Allstate Ins. Co.*, 559 U.S. ___ (2010), held that, irrespective of *Erie*, §901(b) does not apply to state-law claims in federal court because it is validly pre-empted by Rule 23. *Id.*, at ___-___ (slip op , at 3-12); *id.*, at ___-___ (plurality opinion) (slip op , at 12-16); *id.*, at ___-___ (STEVENS, J., concurring in part and concurring in judgment) (slip op., at 14-22). That holding assuredly affects—and in all likelihood eliminates—*Bonime*'s primary basis for applying §901(b) in federal court. The dissent insists, however, that *Bonime*'s second ground remains unaffected. *Post*, at 3 (opinion of GINSBURG, J.).

On one reading of *Bonime*'s opaque second ground, that is true: If the Second Circuit meant that §227(b)(3) requires federal courts hearing claims under the Act to apply all state procedural rules that would

effectively bar a suit, then *Shady Grove* has no bearing That is, however, a highly implausible reading of the Act. Besides effecting an implied partial repeal of the Rules Enabling Act, 28 U.S.C. §2072, it would require federal courts to enforce any prerequisite to suit state law makes mandatory—a state rule limiting the length of the complaint, for example, or specifying the color and size of the paper.

A more probable meaning of *Bonime*'s second ground is that when a State closes its doors to claims under the Act §227(b)(3) requires federal courts in the State to do so as well; but when such claims are allowed, the federal forum may apply its own procedures in processing them. See 547 F.3d at 502 ("This statutory language is unambiguous—a claim under the [Act] cannot be brought if not permitted by state law"). Nothing in *Bonime* suggests, for example, that a federal court could not consolidate two suits under the Act for its own convenience, see Fed. Rule Civ. Proc 42(a), even if the State's courts did not allow consolidation Although that logic applies equally to Rule 23's method of combining claims, *Bonime* may simply have assumed—as the appellee urged it to conclude,[1] as a number of district courts had held,[2] and

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[1] Brief for Defendant-Appellee in No. 07-1136 (CA2), pp. 35-36.

[2] See, *e.g.*, *Leider* v. *Ralfe*, 387 F. Supp. 2d 283, 290 (SDNY 2005); *In re Relafen Antitrust Litigation*, 221 F.R.D. 260, 284-285 (Mass. 2004); *Dornberger* v *Metropolitan Life Ins. Co.*, 182 F.R.D. 72, 84 (SDNY 1999)

as the Second Circuit itself held three weeks later[3] —that Rule 23 does not address whether class actions are available for specific claims. If that is what *Bonime* had in mind, *Shady Grove* will likely affect the Second Circuit's analysis.

Shady Grove would also affect the outcome if the Bonime court believed that even if Rule 23 would otherwise allow a federal court to entertain a class action, §227(b)(3) supersedes Rule 23 by precluding suits that cannot be brought in state courts, including class actions barred by §901(b). *Shady Grove* reveals the error in this analysis: Section 901(b) does not prevent a plaintiff from bringing "an action to recover a penalty, or minimum measure of recovery created or imposed by statute"—as would be necessary to implicate §227(b)(3)—but only from "maintain[ing]" such a suit "*as a class action*" (emphasis added). *Shady Grove*, 559 U.S., at ___ (plurality opinion) (slip op., at 14); see also *id.*, at ___-___, (slip op., at 4-8)

For these reasons, I concur in the Court's order.

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[3] See *Shady Grove Orthopedic Assocs., P. A.*, v. *Allstate Ins. Co.*, 549 F.3d 137, 143-145 (2008).

SUPREME COURT OF THE UNITED STATES

CHARLES E. HOLSTER, III *v.* GATCO, INC.,dba FOLIO ASSOCIATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08-1307. Decided April 19, 2010

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

Petitioner Charles Holster filed this putative class action against Gatco, Inc., in federal court, invoking the court's jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. §1332(d). Holster sought statutory damages for Gatco's alleged violation of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. §227, which authorizes a "[p]rivate right of action" when a person is "otherwise permitted by the laws or rules of court of a State" to bring the action. §227(b)(3).

The District Court dismissed Holster's suit based on N. Y. Civ. Prac. Law Ann. (CPLR) §901(b) (West 2006), the provision at issue in *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U.S. ___ (2010) That statute prescribes that, unless specifically permitted, "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." §901(b). The District Court noted that, pursuant to §901(b), New York courts had closed their doors to

class actions seeking statutory damages under the TCPA. 485 F Supp. 2d 179, 185 (EDNY 2007).

Adopting its prior decision in *Bonime* v. *Avaya, Inc.*, 547 F.3d 497 (2008), the Second Circuit summarily affirmed. *Bonime* held that §901(b) barred TCPA claims brought as class actions for two independent reasons. First, the Court of Appeals determined that §901(b) governed because it qualified as "substantive" under the doctrine of *Erie R. Co.* v *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). 547 F.3d at 501-502.

As a "second, independent" ground for its holding, the *Bonime* panel stated:

> "The private right of action created by the TCPA allows a person or entity to, 'if *otherwise permitted by the laws or rules of court of a State*, bring . . .' an action for a violation of the TCPA. See 47 U.S.C. §227(b)(3) (emphasis added). This statutory language is unambiguous—a claim under the TCPA cannot be brought if not permitted by state law. 'In determining the proper interpretation of a statute, this court will look first to the plain language of a statute and interpret it by its ordinary, common meaning. If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words.' *Tyler* v. *Douglas*, 280 F.3d 116, 122 (2d Cir. 2001) (internal citations, quotation marks, and alteration omitted). This provision constitutes an express

limitation on the TCPA which federal courts are required to respect." *Id.*, at 502

Judge Calabresi concurred, joining only the second ground "identified by the majority for its conclusion." *Ibid.* As Judge Calabresi explained:

> "A state law that bars suit in state court, like C. P. L. R. 901(b), . . . effectively eliminates the cause of action created under the TCPA because it eliminates the 'may' and the rest of the phrase that follows ('bring . . . an action'). Federal law (the TCPA's cause of action) directs courts to look to 'the laws' and 'rules of court' of a state. Thus, when a state refuses to recognize a cause of action, there remains no cause of action to which any grant of federal court jurisdiction could attach." *Id.*, at 503.

Although *Shady Grove* may bear on the Second Circuit's Erie analysis,[1] nothing in *Shady Grove* calls for a reading of §227(b)(3) that fails fully to honor "the laws [and] rules of court of [New York] State." The Second Circuit's interpretation of the TCPA's private-right-of-action authorization stands on its own footing

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[1] Holster, however, arguably forfeited the argument, accepted in *Shady Grove*, that Federal Rule of Civil Procedure 23 preempts §901(b); the District Court concluded that Rule 23 and §901(b) did not conflict and noted that Holster "d[id] not dispute" that point. 485 F. Supp. 2d 179, 185, n. 3 (EDNY 2007).

as an adequate and independent ground for dismissing Holster's suit. I would spare the Court of Appeals the necessity of revisiting—and, presumably, reinstating—its TCPA-grounded ruling.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Docket No. 07-2191-cv

Dated and Entered October 31, 2008

Charles E. Holster III, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v.

Gatco, Inc., doing business as Folio Associates,

Defendant-Appellee.

For Appellant: Todd C. Bank, Kew Gardens, N.Y.

For Appellee: Jeremy Gilman & Gregory Lucht (Benesch, Friedlander, Coplan & Aronoff LLP), Cleveland, OH; Joel Shafferman, New York, N.Y.

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied

by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31 day of October, two thousand and eight.

PRESENT: HON. GUIDO CALABRESI, HON. BARRINGTON D. PARKER, Circuit Judges, and HON. STEFAN R. UNDERHILL,[1] District Judge.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that Plaintiff-Appellant's appeal is DENIED.

Charles E. Holster III brought a putative class action in the United States District Court for the Eastern District of New York (Bianco, J.) alleging

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[1] The Honorable Stefan R. Underhill, of the United States District Court for the District of Connecticut, sitting by designation.

violations of the Telephone Consumer Protection Act ("TCPA"), 47 U S.C. § 227(b)(1)(C). Federal jurisdiction was grounded on diversity of citizenship. *See* 28 U S.C § 1332(d)(2). The District Court dismissed the complaint *See Holster v. Gatco, Inc.*, 485 F. Supp. 2d 179, 180 (E.D.N.Y. 2007). We affirm. *See Bonime v. Avaya, Inc.*, 07-1136-cv, F. 3d (2d Cir. 2008). The judgment of the District Court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER

Dated and Entered March 23, 2007

485 F. Supp. 2d 179

CHARLES E. HOLSTER III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

VERSUS

GATCO, INC., D/B/A FOLIO ASSOCIATES,

Defendant.

JOSEPH F. BIANCO, District Judge:

Plaintiff commenced this action individually and on behalf of others similarly situated alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(C), and regulation 47 C.F.R. § 64.1200(a)(3), promulgated thereunder (hereinafter referred to collectively as "TCPA"). Before this Court are defendant's motion to dismiss for lack of subject-matter jurisdiction and plaintiff's motion for class certification. The issue presented in this case is whether a New York law that prevents TCPA class actions from being maintained in state court divests

federal courts of jurisdiction over a TCPA class action brought in federal court pursuant to diversity jurisdiction. As set forth below, the Court concludes that (1) the substantive law of the state applies in TCPA class actions brought in federal court, and (2) pursuant to substantive New York law, a class may not be maintained in the instant lawsuit for alleged violations of the TCPA. Therefore, since there can be no class action for TCPA claims under New York law, and the parties concede that there is no basis for jurisdiction in the absence of such a class action (because the amount in controversy cannot be met), this case must be dismissed.

I. BACKGROUND

A. Facts

The following facts are derived from the amended complaint and are taken as true for purposes of this motion.

On or about January 25, 2002, defendant Gatco, Inc., doing business as Folio Associates ("Gatco"), a citizen of Massachusetts, sent an unsolicited facsimile (hereinafter "fax") advertisement to plaintiff Charles E. Holster III. (Am. Compl. PP 7, 8.) Plaintiff is a citizen of New York and maintains and operates his fax machine at his office in Mineola, New York. (*Id.* P 6) Defendant transmitted unsolicited advertisements via fax to more than 10,000 recipients, including plaintiff. (*Id* P 10) Defendant did not seek prior express invitation or permission from any of the recipients to transmit the fax, nor did plaintiff give defendant prior express permission to transmit the fax. (*Id.* PP 9, 11.) According to the complaint, these unsolicited faxes are

prohibited by the TCPA and entitle plaintiff (and proposed class members) to, among other relief, $ 1,500 in treble damages per fax.

B. Procedural History

Plaintiff commenced this action individually and on behalf of others similarly situated on May 24, 2005 seeking statutory damages, injunctive relief, attorneys' fees and costs for violations of the TCPA. On July 11, 2005, plaintiff filed an amended complaint. Plaintiff alleges that jurisdiction is based on diversity pursuant to 28 U.S.C. § 1332.

On February 24, 2006, this case was reassigned to the undersigned from the Honorable Denis R. Hurley. On June 19, 2006, defendant moved to dismiss the case for lack of subject-matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3) The Court heard argument on the motion to dismiss on July 19, 2006, and granted plaintiff permission to brief class certification prior to deciding the motion to dismiss. On October 5, 2006, plaintiff moved for class certification. On November 2, 2006, the Court heard argument on the motion for class certification. Accordingly, presently before this Court are two motions: (1) defendant's motion to dismiss the case for lack of jurisdiction on the grounds that (a) a TCPA class action may not be maintained under Rule 23 of the Federal Rules of Civil Procedure and/or (b) a class action may not be maintained pursuant to N.Y.C.P.L.R. § 901(b); and (2) plaintiff's motion for class certification.

II. DISCUSSION

A The TCPA

This case is among a recent string of lawsuits alleging the transmittal of unsolicited advertisements via fax in violation of the TCPA. The TCPA makes it unlawful "for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement" unless certain conditions are met. 47 U S.C. § 227(b)(1)(C). A private right of action exists under the statute pursuant to § 227(b)(3) which provides:

> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State (A) an action based on a violation of this subsection . . . to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or (C) both such actions.

47 U.S.C. § 227(b)(3). Furthermore, a court may award treble damages in the amount of $ 1,500 per fax if it finds that the defendant "willfully or knowingly" violated the statute *Id.*

B. Jurisdiction Under the TCPA

In *Foxhall Realty Law Offices, Inc. v.*

Telecommns Premium Servs., Ltd., 156 F.3d 432, 436 (2d Cir 1998), the Second Circuit held that federal courts lack federal question jurisdiction over claims brought under the TCPA. More recently, the Second Circuit clarified in *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 340-41 (2d Cir. 2006) that, although federal question jurisdiction does not exist under the TCPA, federal courts sitting in diversity may hear private causes of action under the TCPA. In order to meet the amount in controversy requirement of 28 U S.C. § 1332(a), however, individuals attempting to pursue a private right of action in federal court are often forced to do so as a class pursuant to Federal Rule of Civil Procedure 23 because one individual is unable to satisfy the amount in controversy requirement.[1] *See, e.g., Gottlieb*, 436 F.3d at 343 n.10 (explaining that "[i]n order to meet the amount-in-controversy requirement, a single plaintiff would have to receive either 150 faxes from a single defendant, assuming $ 500 in statutory damages per fax, or 50 faxes from that defendant, assuming treble damages").

There is a disagreement among federal courts as to whether a class of plaintiffs pursuing TCPA claims

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The Class Action Fairness Act ("CAFA") "amended diversity jurisdiction requirements by vesting jurisdiction in the federal courts over class actions where, inter alia, the amount in controversy exceeds $ 5 million[,]" thereby abolishing the rule that prevented a class of plaintiffs from aggregating claims. *DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d 271, 273 (2d Cir. 2006) (citing 28 U.S.C. 1332(d)(2) and *Gottlieb*, 436 F.3d at 341 n.7).

can satisfy the requirements of Rule 23. *Compare Kenro, Inc. v. Fax Daily*, 962 F. Supp. 1162, 1169 (D. Ind. 1997) (denying class certification for TCPA claimants because proposed class definition would require court to examine whether each potential class member had invited or given permission for transmission of the fax at issue); and *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403-04 (E.D. Pa. 1995) (same) *with Kavu, Inc. v. Omnipak Corp.*, No. 06-CV-109 (RSL), 2007 U S. Dist. LEXIS 5207 (D. Wash Jan. 23, 2007) (granting class certification to TCPA claimants); and *Gene & Gene, LLC v. Biopay, LLC*, No 05-CV-121 (JJB), 240 F.R.D. 239, 2006 U.S. Dist. LEXIS 95082 (D La. Dec. 20, 2006) (same). Neither the Supreme Court nor the Second Circuit has addressed whether a class action may be maintained for TCPA claims. This case, however, first raises a more discrete jurisdictional question also not yet addressed by the Second Circuit—that is, whether, pursuant to the *Erie* doctrine, N.Y. C.P.L.R. § 901(b) prevents class action plaintiffs in New York seeking damages under the TCPA from invoking federal diversity jurisdiction under the Class Action Fairness Act. N.Y. C.P.L R. § 901(b) provides:

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action

Thus, instead of examining the broader question of whether a TCPA class action may satisfy the

requirements of Rule 23, the Court will (1) determine whether substantive state law applies to TCPA cases proceeding in federal courts sitting in diversity jurisdiction, and, (2) if substantive state law does apply to this action, whether § 901(b) of New York law, which precludes TCPA class actions in state court, is substantive or procedural. *Cf. McGaughey v. Treistman*, No. 05-CV-7069 (HB), 2007 U.S Dist LEXIS 126, at *11 n.5 (S.D.N.Y. Jan. 4, 2007) (denying class certification and declining to address the jurisdictional issue).

1. The *Erie* Doctrine

In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), the Supreme Court instructed federal courts sitting in diversity jurisdiction as to the application of federal versus state laws. It is now well established that, "[u]nder the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427, 116 S. Ct. 2211, 135 L. Ed 2d 659 (1996); *see also Allianz Ins. Co v. Lerner*, 416 F 3d 109, 118 (2d Cir. 2005) (citing Gasperini and recognizing that "New York state procedural rules do not apply . . . to a federal court sitting in diversity"). "The rationale of [*Erie*] was, first, that federal courts should obtain results substantially similar to those reached by state courts considering the same cause of action, and, second, that federal courts should avoid application of federal law if that application would significantly encourage forum shopping by prospective out-of-state litigants." *Morse v. Elmira Country Club*, 752 F.2d 35, 37 (2d Cir. 1984) (citing *Walker v. Armco Steel*, 446 U.S. 740, 747, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980) and *Hanna v.*

Plumer, 380 U.S. 460, 467, 85 S Ct. 1136, 14 L Ed. 2d 8 (1965)) "'[T]he *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.'" *In re Gaston & Snow*, 243 F.3d 599, 607 (2d Cir. 2001) (quoting *Maternally Yours, Inc. v Your Maternity Shop, Inc.*, 234 F.2d 538, 541 n.1 (2d Cir. 1956)). Courts applying the *Erie* doctrine are sometimes faced with the critical task of determining whether a law is substantive or procedural. "[However,] where the matter in question is one covered by the Federal Rules of Civil Procedure, 'it is settled that . . . the Federal Rule applies regardless of contrary state law.'" *Com/Tech Commun. Tech., Inc. v. Wireless Data Sys., Inc.*, 163 F.3d 149, 150-51 (2d Cir. 1998) (quoting *Gasperini*, 518 U.S. at 427)

2 The Second Circuit's Opinion in *Gottlieb*

As stated *supra*, because the TCPA does not give rise to federal question jurisdiction, jurisdiction over this action is, and must be, alleged pursuant to diversity jurisdiction under 28 U.S.C. § 1332. However, the TCPA is a federally enacted statute. This presents an abstruse situation whereby the Court must harmonize the necessary application of *Erie* with the existence of a Congressionally enacted statute that creates a cause of action, but provides no federal question jurisdiction access to federal courts for that cause of action. Plaintiff attempts to resolve this thorny issue by arguing that this diversity case is governed not only by federal procedural law, but also exclusively by federal substantive law Plaintiff finds support for this proposition in a footnote from the Second Circuit's decision in *Gottlieb*. There, the Second Circuit noted,

> [i]t is odd, of course, that a federal court sitting in diversity and considering a TCPA claim would apply federal substantive and procedural law. This fact, however, only emphasizes the sui generis nature of the statute. It is the rare federal statute that creates a cause of action that gives rise to jurisdiction under § 1332, but not under § 1331.

Gottlieb, 436 F.3d at 343 n 8. However, the Second Circuit also stated,

> [i]nsofar as Congress sought, via the TCPA, to enact the functional equivalent of a state law that was beyond the jurisdiction of a state to enact, it would be odd to conclude that Congress intended that statute to be treated differently, for purposes of diversity jurisdiction, from any other state statute

Gottlieb, 436 F.3d at 342. If this Court were to hold that state substantive law does not apply to a private cause of action brought under the TCPA, it would undermine the Second Circuit's broader instruction in *Gottlieb* that the TCPA should be treated as any other state statute. Although *Gottlieb* did recognize the anomaly created by a federal statute under which federal courts may only hear private causes of action in diversity jurisdiction, it did not instruct courts to ignore the dictates of *Erie* and its progeny when exercising diversity jurisdiction over TCPA claims. To read the footnote in *Gottlieb* as plaintiff proposes would ignore *Gottlieb*'s statement that the TCPA is "the functional equivalent of a state law." 436 F 3d at

342.

The Court also finds support for this position in the plain language of the statute. As stated *supra*, the TCPA provides that: "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State." 47 U.S.C. § 227(b)(3) (emphasis supplied). Plaintiff would have this Court read the statute such that the language has no bearing on how TCPA claims are administered in federal court. However, the language of the TCPA clearly indicates that the TCPA merely enables states to permit a cause of action and contemplates that the laws or rules of the courts of the state may restrict such actions. As the Second Circuit noted in *Gottlieb*, "Congress . . . sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps." 436 F.3d at 342. To permit this action to proceed in federal court, without applying the substantive law of the state, would, in essence, ignore the role of New York as the forum state and it would divest New York of the ability to decide in what situations a cause of action exists under the TCPA because plaintiffs with claims arising in New York would engage in forum shopping.

Therefore, although the substantive law giving rise to the private cause of action is a federally-enacted statute, Congress has rested jurisdiction in the states. Thus, this Court, in exercising diversity jurisdiction over TCPA claims, must apply *Erie* such that state substantive law applies. Plaintiff contends that this requires application of federal and state substantive law and suggests that such a result is unfounded. The Court disagrees that this outcome is unworkable and

instead finds that, in applying substantive law, the federal court must simply stand in the shoes of the state court as it would in any diversity action. In Guaranty Trust Co., Justice Frankfurter stated:

> Diversity jurisdiction is founded on assurance to nonresident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall, entertained "apprehensions" lest distant suitors be subjected to local bias in State courts, or, at least, viewed with "indulgence the possible fears and apprehensions" of such suitors. *Bank of the United States v. Deveaux*, 9 U.S. 61, 5 Cranch 61, 87, 3 L Ed. 38. And so Congress afforded out-of-State litigants another tribunal, not another body of law.

Guaranty Trust Co. v. York, 326 U.S. 99, 111-112, 65 S. Ct. 1464, 89 L Ed. 2079 (1945). To hold that the substantive law of the forum state does not apply to TCPA claims brought in federal court pursuant to diversity would have the effect of creating another body of law, thereby encouraging forum-shopping and allowing inequitable administration of the laws. Thus, because Congress rested jurisdiction for private causes of action under the TCPA with the states, federal courts hearing TCPA claims in diversity jurisdiction should apply the same substantive law that the state court would apply

Accordingly, consistent with *Erie* and *Gottlieb*, this Court will apply the TCPA, applicable state

substantive law, and federal procedural law.[2]

3. N.Y. C.P.L.R. § 901(b)

N.Y. C P L R. § 901(b) prohibits lawsuits seeking a penalty from being brought as class actions, absent specific legislative authorization. Accordingly, New York state courts have held that class actions seeking penalties under the TCPA may not be maintained in New York state court *See Giovanniello v. Carolina Wholesale Off. Mach. Co.*, Inc., 29 A.D.3d 737, 815 N.Y S 2d 248, 249 (N.Y. App. Div. 2006); *Weber v. Rainbow Software, Inc.*, 21 A.D.3d 411, 799 N Y.S.2d 428 (N Y. App. Div. 2005); *Leyse v. Flagship Capital Servs. Corp.*, 22 A.D.3d 426, 803 N.Y.S.2d 52, 53 (N.Y. App. Div. 2005); *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 22 A D 3d 148, 799 N.Y.S.2d 795, 800 (N.Y. App Div. 2005); *Bonime v. Bridge 21, Inc.*, 21 A.D 3d 393, 799 N.Y.S.2d 417, 418 (N.Y. App. Div 2005); *Bonime v. Disc. Funding Assocs.*, 21 A D.3d 393, 799 N.Y.S.2d 418, 419 (N.Y. App. Div 2005).

Having determined *supra* that this Court must apply under *Erie* any applicable substantive law of the state to a TCPA claim, the Court must determine whether § 901(b) is substantive or procedural.[3] The

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[2] Neither party argues that the law of a state other than that of New York governs the instant action.

[3] As an initial matter, the Court finds, and plaintiff does not dispute, that § 901(b) is a matter not covered by Federal Rule of Civil Procedure 23. *See Leider v. Ralfe*, 387 F. Supp. 2d 283, 290 (S.D.N.Y. 2005) (finding that

Second Circuit has stated that

> The rational of [*Erie*] was, first, that federal courts should obtain results substantially similar to those reached by state courts considering the same cause of action, and second, that federal courts should avoid application of federal law if that application would significantly encourage forum shopping by prospective out-of-state litigants.

Morse, 752 F.2d at 37 (citing *Walker*, 446 U.S. at 747 and *Hanna*, 380 U.S. at 467) Upon that rationale, the majority of courts have concluded that § 901(b) is a substantive law which must be applied in the federal forum. *See, e.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467 (E.D.N.Y. 2006) (stating that "certification in class actions brought under diversity jurisdiction . . . is subject to the limitation imposed by § 901(b)"); *Leider v. Ralfe*, 387 F. Supp. 2d 283, 291 (S.D.N.Y. 2005)(noting that the "bulk of cases to address the applicability of N.Y. C.P.L.R. § 901(b) have decided that the statute is substantive and applies with equal force in federal litigation") (collecting cases); *Noble v. 93 Univ. Place Corp.*, No. 02-CV-1803 (SAS), 224 F.R.D. 330, 2004 U.S. Dist. LEXIS 7631, at *28 (S.D.N.Y. 2004)

"there is no collision between Fed. R. Civ. P. 23 and N.Y. C.P.L.R. § 901(b)"); *In re Relafen Antitrust Litig.*, No. P74,405 (CCH), 221 F.R.D. 260, 2004 U.S. Dist. LEXIS 8539, at *91 (D. Mass. 2004) (same); *Dornberger v. Metropolitan Life Ins. Co.*, No. 95-CV-10374 (LBS), 182 F.R.D. 72, 1998 U.S. Dist. LEXIS 13101, at *38 (S.D.N.Y. 1998) (same).

("[S]ection 901(b) is arguably substantive"); *Ansoumana v. Gristede's Operating Corp.*, No. 00-CV-253 (AKH), 201 F.R.D. 81, 2001 U.S. Dist. LEXIS 6717, at *18 (S.D N.Y 2001) (applying § 901(b) to action proceeding in federal court based on diversity jurisdiction), *but see In re Oot*, 112 B.R. 497, 502 (Bankr. N.D.N.Y. 1989) (finding that § 901(b) is a procedural rule). This Court agrees with the prevailing line of cases holding that § 901(b) is substantive and thus finds that § 901(b) applies with equal force in the present action as it would if this case were brought in state court.

In a recent well-reasoned opinion addressing this exact issue, the Honorable Carol B. Amon dismissed a TCPA class action brought in federal court for lack of subject-matter jurisdiction. *See Bonime v. Avaya, Inc.*, No. 06-CV-1630 (CBA), 2006 U.S. Dist. LEXIS 91964 (E.D.N.Y Dec. 20, 2006). After a thorough analysis, Judge Amon held that state substantive law applies to TCPA claims brought in federal courts sitting in diversity and that § 901(b) is a substantive law that prohibits plaintiffs from asserting a class action predicated on TCPA claims where New York law provides the relevant state law. 2006 U S. Dist LEXIS 91964 at *15-*16. This Court agrees with Judge Amon's sound reasoning in Bonime.[4]

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[4] By letter dated February 26, 2007, counsel for defendant requested a pre-motion conference on a proposed motion to stay the proceedings pending the appeal of Bonime. However, this Court had previously addressed the issue of whether to stay the action on a telephone conference held on January 16, 2007. During that telephone conference, counsel for plaintiff objected

Accordingly, just as plaintiff is unable to maintain a class action alleging claims under the TCPA in a state court in New York, plaintiff is unable to maintain a class action in this Court for alleged violations of the TCPA where New York law applies. Otherwise, a litigant who would be barred by § 901(b) from bringing a TCPA class action in New York state court would be able to bring that same lawsuit in federal court sitting in diversity in New York, even though the TCPA did not create federal question jurisdiction, but instead simply created a cause of action which could be brought in state court "if otherwise permitted by the laws or rues of court of a State." 47 U.S.C. § 227(b)(3). Such an anomalous result would be inconsistent with the explicit statutory language of the TCPA, as well as *Gottlieb* and the "twin aims" of *Erie*—"discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S at 468.

Having found that § 901(b) precludes plaintiff from maintaining a class action in the instant case, the Court must dismiss this case for lack of subject-matter jurisdiction because plaintiff concedes that he cannot otherwise meet the amount in controversy requirement of § 1332 and has asserted no other source of federal jurisdiction.[5]

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to a stay and the Court agreed to proceed with ruling on the pending motions. Accordingly, having decided the pending motions, defendant's proposed motion to revisit the issue and stay the proceedings is denied.

[5] Because the Court finds that N.Y. C.P.L.R. § 901(b) prevents the instant case from proceeding as a class

III CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is GRANTED and plaintiff's motion for class certification is DENIED as moot. The Clerk of the Court is directed to enter judgment accordingly and to close this case.

SO ORDERED.

JOSEPH F BIANCO

United States District Judge

Dated March 23, 2007
Central Islip, New York

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The attorney for plaintiff is Todd C Bank, Esq, 119-40 Union Turnpike, Fourth Floor, Kew Gardens, New York 11415. The attorney for defendant is Joel M. Shafferman, Esq., 80 Wall Street, Suite 910, New York, New York 10005.

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action, the Court need not address defendant's alternative argument that class actions may not be maintained under the TCPA.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 25th day of October, two thousand ten,

Docket Number: 07-2191-cv

CHARLES E HOLSTER III, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v

GATCO, INC , doing business as FOLIO ASSOCIATES,

Defendant-Appellee.

Charles Holster having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
S/ Catherine O'Hagan Wolfe

(2)

No. 10-944

[illegible] MAR 25 2011

In the Supreme Court of the United States

CHARLES E. HOLSTER III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

GATCO, INC., DOING BUSINESS AS FOLIO ASSOCIATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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March 25, 2011

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QUESTION PRESENTED

1. Whether this Court should review the Second Circuit's application of long-settled principles of statutory construction when it construed, and then enforced as written, the unambiguous "private right of actions" provisions of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(3).

RULE 29.6 STATEMENT

Gatco, Inc., dba Folio Associates, does not have a parent company and there are no publicly held companies that own more than ten percent (10%) of Respondent's stock.

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Under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, a private party "may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" a claim for an alleged violation of the TCPA. 47 U.S.C. § 227(b)(3) ("section 227(b)(3)").

The TCPA's unambiguous language therefore limits private rights of action to those cases where the laws of the state in which the action is filed permit the filing of such claims.

Here, Petitioner commenced his putative TCPA class action in a federal district court in New York; specifically, the United States District Court for the Eastern District of New York. His action sought an award of statutory penalties against Respondent pursuant to section 227(b)(3).

Section 901(b) of the New York Civil Practice Law and Rules ("CPLR"), however, does not allow actions seeking to recover statutory penalties to be maintained as class actions.

Petitioner fails to recognize the basic statutory construction of the TCPA's private right of action – section 227(b)(3). The TCPA's language is clear: a private right of action under the TCPA may only be brought if the claimant is "otherwise permitted" to do so "by the laws or rules of court of a State" in which the action has been brought.

Petitioner brought his putative TCPA class action in a court located in New York. New York law – specifically, CPLR 901(b) – prohibits class actions under the TCPA. His action is barred by the plain,

unambiguous language of the TCPA. The district court and United States Court of Appeals for the Second Circuit so held, and their decisions were justified by well-settled principles of statutory construction.

STATEMENT

I. Statutory Background

A. TCPA

The TCPA was enacted to "to deal with an increasingly common nuisance – telemarketing." *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 514 (3d Cir. 1998). The TCPA was intended to give states the authority to regulate interstate telemarketing practices because of the ability of telemarketers to avoid state law restrictions by only placing interstate calls. *See* S. Rep. No. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968.

To diminish and/or eliminate unwanted interstate telemarketing, Congress enacted a private right of action for TCPA violations. The TCPA provides that a private party "may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State. . . an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater. . ." 47 U.S.C. § 227(b)(3)(B). If a court finds that a defendant "willfully or knowingly" violated the TCPA, it may increase the award to not more than treble the damage award. *Id.*

B. Class Action Fairness Act of 2005 ("CAFA")

In 2005, CAFA amended 28 U.S.C. §1332, to, among other things, permit aggregation of damages claimed by members of a putative class to meet a new $5,000,000 threshold for diversity jurisdiction. *See* 28 U.S.C. § 1332(d). In enacting CAFA, Congress recognized that "[o]ne of the primary historical reasons for diversity jurisdiction 'is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court.'" S. Rep. No. 109-14, Section III (Purposes), at 5 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 6 (citation omitted). CAFA was intended to thwart abuses of class action lawsuits and forum shopping.

C. CPLR 901(b)

CPLR 901(b) provides that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." CPLR 901(b) (McKinney's 2005). It is settled that CPLR 901(b) prohibits TCPA class actions under New York law. *See Bonime v. Bridge 21, Inc.*, 21 A.D.3d 393, 393 (2d Dep't 2005); *Leyse v. Flagship Capital Servs. Corp.*, 22 A.D.3d 426, 426 (1st Dep't 2005); *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 22 A.D.3d 148, 149 (2d Dep't 2005).

II. Petitioner's Lawsuit

Petitioner filed his Amended Class Action Complaint against Respondent in the United States District Court for the Eastern District of New York on July 11, 2005. His individual claim asserts a single violation of the TCPA and seeks statutory damages of $500 plus additional statutory damages of $1,000 in the event the court were to find that the alleged violation was willful. Pet. App. 20a-21a. Petitioner grounded his claim to federal subject matter jurisdiction on CAFA. Pet. 1. In an effort to meet the amount in controversy requirement for diversity jurisdiction, he framed his complaint as a putative class action on behalf of all persons and entities to which Respondent allegedly sent unsolicited facsimile advertisements in violation of the TCPA.

III. District Court's Decision

Respondent moved to dismiss Petitioner's Amended Class Action Complaint for lack of subject matter jurisdiction. The district court granted Respondent's Motion to Dismiss based on CPLR 901(b)'s prohibition of TCPA class actions. Pet. App. 33a-34a. The district court reasoned that state substantive law applies to putative TCPA class actions brought in federal court, which required the district court to apply CPLR 901(b) to Petitioner's claim. *Id.* at 32a. Because CPLR 901(b) prohibits TCPA class actions brought in New York, the district court held that it applied in this case, and dismissed Petitioner's claim. *Id.* at 33a.

IV. Second Circuit's October 31, 2008 Decision

Petitioner appealed to the Second Circuit Court of Appeals. By Summary Order, the Second Circuit affirmed. Pet. App. 16a. Its holding incorporated its decision in the case of *Bonime v. Avaya, Inc. ("Bonime")*, 547 F.3d 497 (2d Cir. 2008), in which the Second Circuit determined that arguments similar to those raised by Petitioner failed for two "independent" reasons. *Id.* at 16a-18a; Pet. 6-7; *Bonime*, 547 F.3d at 501-502.

First, the text of the TCPA clearly indicates that courts should treat the TCPA as a state law. Pet. 7; *Bonime*, 547 F.3d at 501. Pursuant to the Congressional instruction set forth in the TCPA's private right of action provision, the Second Circuit held that federal courts must apply state substantive law to putative TCPA class actions brought in federal court. *Bonime*, 547 F.3d at 501. Accordingly, CPLR 901(b)'s express prohibition against TCPA class actions applied to Petitioner's claim and mandated its dismissal. *Id.*; Pet. App. 16a-18a.

Second, the unambiguous language of the TCPA's private right of action provision "constitutes an express limitation on the TCPA which federal courts are required to respect." Pet. 7; *Bonime*, 547 F.3d at 502.

Following the rendition of the Second Circuit's decision, Petitioner sought panel rehearing, or in the alternative, for rehearing en banc, but the Second Circuit denied his request. The Second Circuit's order is reprinted in the Appendix to this Brief in Opposition ("Appx.") at 1b.

V. United States Supreme Court's Remand Order

On April 16, 2009, Petitioner filed a Petition for Writ of Certiorari. This Court granted the petition, vacated the Second Circuit's judgment and remanded the case to the Second Circuit "for further consideration in light of *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co. ("Shady Grove")*, 559 U.S. ____, 130 S.Ct. 1431 (2010)." In Justice Scalia's concurrence, he asserts that *Shady Grove* "assuredly affects – and in all likelihood eliminates – *Bonime's* primary basis for applying [CPLR] §901(b) in federal court. The dissent insists, however, that *Bonime's* second ground remains unaffected." Pet. App. 9a. While Justice Scalia suggests that *Shady Grove* has an impact on *Bonime's* second "independent" ground, the dissent, authored by Justice Ginsburg, and joined by Justice Breyer, contends that "nothing in *Shady Grove* calls for a reading of section 227(b)(3) that fails to fully honor 'the laws [and] rules of a court of [New York] State.' The Second Circuit's interpretation of the TCPA's private-right-of-action authorization stands on its own footing as an adequate and independent ground for dismissing [Petitioner's] suit." Pet. App. at 14a-15a.

VI. Second Circuit's Decision Upon Remand

Upon remand by this Court, the Second Circuit considered the Supreme Court's decision in *Shady Grove* and again affirmed the district court's dismissal of Petitioner's claim. Pet. App. 7a. While the Second Circuit found that *Shady Grove* abrogated the first independent ground set forth in *Bonime*, it also determined that *Shady Grove* did not undermine the

second ground, which revolved around the basic statutory construction of section 227(b)(3). *Id.* Following the rendition of the Second Circuit's post-remand decision, Petitioner sought panel rehearing with a suggestion for rehearing en banc. The Second Circuit denied Petitioner's request. Appx. at 3b.

ARGUMENT

Nothing about the Second Circuit's decision warrants the exercise of this Court's certiorari jurisdiction. The Second Circuit's decision neither conflicts with that of another United States court of appeals on the same important matter nor with that of a state court of last resort on an important federal question—in fact, the Second Circuit's decision involves no important federal question at all.

It involves, instead, a routine application of long-settled principles of statutory construction—principles which both this Court and lower courts nationwide have long articulated and applied as a matter of law. "As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. 'If the intent of Congress is clear, that is the end of the matter; for the court ... must give effect to the unambiguously expressed intent of Congress.'" *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

Petitioner goes to great lengths in an effort to elevate the Second Circuit's decision to one of profound jurisprudential significance, but the density and circuitry of his argument fail to conceal the fact that

the Second Circuit's decision is the simple consequence of its interpreting and applying a valid and unambiguous statute.

I. Following Remand, the Second Circuit Properly Found that the District Court Correctly Construed and Applied an Unambiguous Statute

When this Court, in *Holster v. Gatco*, 559 U.S. ___, 130 S.Ct. 1575 (2010), issued its order remanding this case to the Second Circuit, it instructed the Second Circuit to consider its prior decision "in light of" *Shady Grove*. Notably, it did not reverse the Second Circuit's original decision in the aftermath of *Shady Grove*.

The Second Circuit complied with that mandate, reconsidered its original decision in light of *Shady Grove*, and affirmed the district court's dismissal of Petitioner's action for lack of subject matter jurisdiction. *Holster v. Gatco, Inc.*, 618 F.3d 214 (2d Cir. 2010); Pet. App. 1a.

In so doing, the Second Circuit acknowledged that the *Shady Grove* decision "abrogated" the first of its two "independent" reasons for originally affirming the district court's decision, *id.* at 217, and its post-remand opinion therefore did not invoke that portion of its original opinion which had been vitiated by *Shady Grove*.

But the Second Circuit also had a second "independent" reason for its original affirmance, and that reason was neither impacted nor even addressed by *Shady Grove*. As noted by the Second Circuit is its post-remand opinion:

> But this answers only a part of the question before us. Though the *Shady Grove* Court said a great deal about the interaction of Rule 23 and C.P.L.R. 901(b), it said nothing at all about the TCPA, and what that statute requires for a federal cause of action to lie. This is not a question that implicates the relationship between the Federal Rules and state rules; it is a standard question of statutory interpretation. What did Congress mean when it said that TCPA suits may proceed "if otherwise permitted by the laws or rules of court of a State," 47 U.S.C. § 227? We now read it, as the concurrence did before, as a delegation by Congress to the states of considerable power to determine which causes of action lie under the TCPA.

Holster, 618 F.3d at 217; Pet. App. 5a. Also,

> [t]hough we find the first ground, predicated on *Erie*, abrogated by *Shady Grove*, we see nothing in the Court's *holding* that undermines the second ground, which rests not on the relationship between the Federal Rules of Civil Procedure and state rules, but on the unique nature of the federal action the TCPA created.

Id. at 216 (italics in original); Pet. App. 4a.

The Second Circuit therefore correctly recognized that *Shady Grove* negated some of the *rationale* for its original decision, but not its holding. *Shady Grove* did not involve the construction and application of the TCPA—in fact, it did not involve the TCPA at all. For that basic reason, this Court's holding in *Shady Grove*

did not compel a reversal of the district court's judgment following remand to the Second Circuit.

Following remand, the Second Circuit engaged in a straightforward inquiry: Did the district court correctly hold that it lacked subject matter jurisdiction over petitioner's putative class action brought under the private right of action provision of the TCPA. Upon analyzing that issue, the Second Circuit engaged in a fundamental, uncontroversial judicial task: it looked at the words of that statute, found them unambiguous, and applied them as Congress had written them.

The TCPA's private right of action provision—section 227(b)(3)—contains language not found in the New York statute under which the plaintiff in *Shady Grove* first sought judicial relief. The latter statute, N. Y. Ins. Law Ann. §5106(a) (West 2009), titled "Fair claims settlement," provides as follows:

> Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with

> securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations.

Section 227(b)(3), on the other hand, provides as follows:

> A person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of that State—
>
> > (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
> >
> > (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
> >
> > (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this subparagraph.

(Italics added.)

Congress, when enacting this statute, expressed in unmistakably lucid language its intention that private-party civil actions under section 227(b)(3) may be

brought only "if otherwise permitted by the laws or rules of court of a State." Congress therefore imposed an express restriction upon those considering bringing an action under that statute: they may do so only if otherwise allowed by the laws or court rules of the state in which they seek to bring that action. If the laws or court rules of that state do not permit such an action, they may not bring it in that forum, and if they do, their action is subject to dismissal for lack of subject matter jurisdiction.

It is telling that Congress did not limit that restrictive clause to read that "[a] person or entity may, if otherwise permitted by *the laws* of a State, bring in an appropriate court of that State." Instead, it extended that restriction to include both "the laws *or rules of court* of a State." (Italics added.) In so doing, Congress plainly prohibited persons from pursuing actions under section 227(b)(3) in states where such actions would be barred for *any* reason—not merely because it runs afoul of substantive state law. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations and internal quotation marks omitted).

Congress was constitutionally empowered to enact section 227(b)(3) and Petitioner has not argued otherwise, nor plausibly could it. Because the language of that statute is unambiguous, "[i]t is well established that ... the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

That is precisely what the Second Circuit did following the remand of this case to that court. It gave effect to the clear language of a valid federal statute and found that Petitioner's putative New York-based class action under section 227(b)(3) was not "permitted by the laws or rules of court" of New York, specifically, by CPLR §901(b), which provides that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."

Shady Grove does not affect that outcome because *Shady Grove* did not construe section 227(b)(3). Unlike the present case, *Shady Grove* originated from a putative class action brought under a *state* statute. State legislatures lack authority to determine the scope of a federal court's jurisdiction. Congress, however, has such authority; it has "plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." *I.N.S. v. Chadha*, 462 U.S. 919, 941 (1983) (citations and internal quotation marks omitted); *see also Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts, and, once the lines are drawn, limits upon federal jurisdiction ... must be neither disregarded nor evaded.") (Citations and internal quotation marks omitted.)

It is also an "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally

permissible bounds." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989). Similarly, "Congress ... has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances." *Shady Grove*, 559 U.S. ___, 130 S.Ct. 1431, 1438 (2010).

Upon enacting section 227(b)(3), Congress properly exercised its power to define the scope of a federal court's jurisdiction when presented with an action brought under that statute. Congress directed that court to look to "the laws or rules of court of" the state in which the action was brought to determine if the action is "otherwise permitted" by those laws or rules. If not permitted, Congress forbade that court from adjudicating that action—meaning that the court would have no jurisdiction to entertain it—and if such an action *were* to be brought, the court would be duty bound to dismiss it.

That is what happened here. Petitioner brought a putative class action under section 227(b)(3) in a federal district court located in a state—New York—in which such an action is not permitted by that state's laws or court rules. The district court, applying the plain language of that statute, dismissed Petitioner's action for lack of subject matter jurisdiction and the Second Circuit affirmed. In so holding, the Second Circuit applied "the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE*

Sylvania, Inc., 447 U.S. 102, 108 (1980). Petitioner's attempts to cloak the underlying proceedings in an air of impenetrable complexity are unavailing. The Second Circuit's decision was correct and derived from its basic application of long-settled principles of law.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York on the 23rd day of January, two thousand and nine,

Docket Number: 07-2191-cv

[Filed January 23, 2009]

Charles E. Holster III, Individually and on Behalf of All Others Similarly Situated,	)
Plaintiff-Appellant,	)
v.	)
Gatco, Inc., doing business as Folio Associates,	)
Defendant-Appellee.	)

ORDER

Appellant, Charles E. Holster III, Individually and on Behalf of All Others Similarly Situated, having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc,* and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc,*

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/Frank Perez
Frank Perez, Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 25th day of October, two thousand and ten.

Docket Number. 07-2191-cv

[Filed October 25, 2010]

CHARLES E. HOLSTER III, Individually and on Behalf of All Others Similarly Situated,	)
Plaintiff-Appellant,	)
v.	)
GATCO, INC., doing business as FOLIO ASSOCIATES,	)
Defendant-Appellee.	)

Charles Holster having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rellearing, and the

active members of the Court having considered the request for rehearing en *banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk